No. 22243

United States Court of Appeals
For the Ninth Circuit

PACIFIC INLAND NAVIGATION CO., INC., *Appellant,*

vs.

FIREMAN'S FUND INSURANCE COMPANY, *Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

BRIEF OF APPELLANT

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vs.		
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Appeal from the United States District Court for the Western District of Washington Southern Division

BRIEF OF APPELLANT

JURISDICTION

This civil action at law was commenced by complaint filed in the United States District Court at Tacoma by the appellant, Pacific Inland Navigation Co., Inc. against the appellee, Fireman's Fund Insurance Company. The complaint alleged that the appellant was a Washington corporation and the appellee was a California corporation and the amount in controversy was in excess of $10,000, exclusive of interest and costs (Tr. 1).

The appellee's answer admitted these jurisdictional allegations (Tr. 13).

The jurisdiction of the United States District Court for the Western District of Washington, Southern Division is based upon USC Title 28, Section 1332.

Summary Judgment in favor of appellee was signed and filed on July 31, 1967 (Tr. 45). Thereafter, appellant duly filed its Notice of Appeal on August 29, 1967 (Tr. 53). Accompanying Notice of Appeal was Appeal and Supersedeas Bond in proper amount and form in accordance with Rule 75, Rules of Civil Procedure (Tr. 49).

The jurisdiction of the United States Court of Appeals for the Ninth Circuit is based upon Title 28, USC, Section 1291.

STATEMENT OF THE CASE

Appellant brought this civil action to compel appellee to honor its contractual obligation to indemnify appellant against loss by reason of liability imposed upon it by law for damages. The contract in question is Fireman's Fund Insurance Company Policy No. LS-1214 effective June 1, 1964. The particular accident was suffered by a longshoreman Friedolf Humpla while directly employed by appellant aboard one of its barges in the Port of Portland, Oregon on September 27, 1964.

Humpla subsequently brought suit against appellant in reliance upon the case of *Reed v. S/S YAKA,* 373 US 410, 10 L.ed 2d 448, 83 S.Ct. 1349 (1963) (Tr. 5). That suit was subsequently tendered for defense to appellee which said tender was rejected (Tr. 1, 13). Thereafter, appellant settled the Humpla suit

for $35,343.85. Of this amount $30,000.00 was paid by appellant and the remaining balance was contributed by appellee through waiver of its statutory lien under the Longshoremen and Harbor Workers' Compensation Act for medical expenses and compensation paid (Tr. 14).

The basis of this suit is the policy of insurance identified above. For convenience, copy of this policy is attached to this brief as an appendix. The coverage upon which appellant relies is set forth in paragraph One (b) stating in part:

> "To indemnify this employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States of America or the Dominion of Canada . . ."

The appellee has denied coverage for this loss suffered by appellant maintaining that endorsement No. 2 restricted policy coverage only to the Longshoremen and Harbor Workers' Compensation Act. Both appellant and appellee, feeling that this was solely a question of construction, filed motions for summary judgment (Tr. 19, 29). Both motions were heard by the court below which thereafter entered its summary judgment on July 31, 1967, stating in part:

> "* * * and the Court having found that there is no dispute of material facts concerning the insurance contract and endorsements thereto issued by Fireman's Fund Insurance Company as Policy No. LS-1214, and concluding that the language of said contract, as endorsed, did not cover the liability of the plaintiff assured in a lawsuit brought under the authority of *Reed vs.*

The Yaka, 373 U.S. 410 * * * " (Tr. 45)

The judgment concludes by dismissing appellant's complaint and awarding the appellee judgment on its counter claim in the amount of $5,343.85 expended by it under waiver of its statutory lien (Tr. 46).

SPECIFICATIONS OF ERRORS

1. The District Court erred in "concluding that the language of said contract [of insurance], as endorsed, did not cover the liability of the plaintiff assured in a lawsuit brought under the authority of *Reed vs. The Yaka,* 373 US 410." (Tr. 45).

2. The District Court erred in dismissing appellant's complaint (Tr. 45).

3. The District Court erred in awarding appellee's judgment on its cross-complaint in the amount of $5,343.85 (Tr. 45).

4. The District Court erred in not concluding that appellee was obligated under coverage One (b) to indemnify appellant for its loss as pleaded.

SUMMARY OF ARGUMENT

Appellant's argument will develop:

I. Appellant's liability to injured longshoreman — the employer-employee relationship, the application of *Reed v. SS YAKA;*

II. Law of forum to apply — diversity rule requires application of State law even though a Marine Insurance policy is involved;

III. The contract of insurance — applicable Washington rules of construction, consideration of the actual contract of insurance under those rules.

ARGUMENT

I—APPELLANT'S LIABILITY TO INJURED LONGSHOREMAN

In *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 90 L.ed 1099, 66 S.Ct. 872 (1946), the doctrine of seaworthiness was extended to longshoremen even though an injured longshoreman was employed by an independent contractor. The effect of this decision was to afford the injured longshoreman recovery against a shipowner under its warranty of seaworthiness.

Since §905 of the Longshoremen and Harbor Workers' Compensation Act states that the liability of "an employer prescribed in §904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . ." the question was destined to arise whether an injured longshoreman could recover under the warranty of seaworthiness when his employer was also the owner or bareboat charterer of the vessel. In dealing with the question, the Supreme Court in *Reed v. S/S YAKA,* 373 US 410, 10 L.ed 2d 448, 83 S.Ct. 1349 (1963) stated:

> "We conclude that petitioner was not barred by the Longshoremen's Act from relying on Pan-Atlantic's liability as a shipowner for the Yaka's unseaworthiness in order to support his libel in rem against the vessel." *Reed v. S/S YAKA,* 10 L.ed 2d, 448, 453.

Humpla's action was thus based on his right against

his shipowner-employer under the warranty of seaworthiness as made available by the *YAKA* decision. Appellant as an employer in settling with Humpla, its employee, brought itself within coverage of provision One (b) of the contract of insurance in issue.

II—LAW OF FORUM TO APPLY

Neither appellant nor appellee has pleaded or argued any law other than the common law of the forum. That state law rather than Federal Maritime Law controls the rights and liabilities under Marine Insurance policies was settled in *Wilburn Boat Co. v. Fireman's Fund Insurance Co.,* 348 U.S. 310, 99 L.ed 337, 75 S.Ct. 368, 55 AMC 467 (1955). The court stated:

> "The whole judicial and legislative history of insurance regulation in the United States warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties. The control of all types of insurance companies and contracts has been primarily a state function since the states came into being."
>
> *Wilburn Boat Co. v. Fireman's Fund Insurance Co.,* 99 L.ed 337, 344 (1955).

The principle that State law will control the construction of marine insurance contracts has been expressly recognized in this circuit in *Employers Mutual Liability Insurance Co. of Wisconsin v. Pacific Inland Navigation Co.,* 358 F.2d 718, 1967 AMC 1855 (9CA, 1966). This case involved the question whether the insurance policy as endorsed covered liability of the insured to the Port of Pasco for damage caused to the Port's dock by fire originating on a barge owned by the insured. Jurisdiction was based on di-

versity. Regarding the applicable law, the Court stated:

> "Federal diversity jurisdiction is invoked. The law of Washington governs. [Sec. Wilburn Boat Co. v. Fireman's Fund Ins. Co., 348 U.S. 310, 75 S.Ct. 368, 99 L.ed. 337 (1955); Erie R. R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.ed. 1188 (1938.]"
>
> *Employers Mutual Liability Insurance Co. of Wisconsin v. Pacific Inland Navigation Co.,* 358 F.2d 718, 719, 1967 AMC 1855 (9CA, 1966).

These cases clearly demonstrate the applicability of state law to a marine insurance contract such as is involved in this case. In the absence of pleading and/or proof of foreign law, the law of the forum, that is the common law of the State of Washington, should govern. This conflicts of law principle, "the local law theory" is advocated both by Ehrenzweig in his treatise, *Conflicts of Laws,* and Currie in his work, *Selected Essays on the Conflict of Laws.*

Currie's conclusions on the local law theory regarding the applicability of the law of the forum are summed up as follows:

> "1. The normal business of courts being the adjudication of domestic cases and the normal tendency of lawyers and judges being to think in terms of domestic law, the normal expectation should be that the rule of decision will be supplied by the domestic law as a matter of course.
>
> "2. The court should ordinarily depart from this procedure only at the instance of a party wishing to obtain the advantage of a foreign law.
>
> "3. The law of the forum, as a source of the rule of decision, should normally be displaced only by the interested party's timely invocation

> of the foreign law. The interested party invokes the foreign law by calling attention to its relevance and its superior claim to be applied, and by informing the court of its tenor. . . ."
>
> *Selected Essays on the Conflict of Law*, by Currie, Page 75

A recent Ninth Circuit decision, *Continental Casualty Co. v. Thompson,* 369 F.2d 157 (9 CA 1966) evidences an acceptance of the local law theory of conflicts of law advocated by Ehrenzweig and Currie. In this regard, the court stated:

> "In this diversity case, we are of course bound to apply the law as would the Supreme Court of Washington. In the court below appellant asserted that the proper choice of law should be that of Washington, D. C., where the master policy under which Thompson was insured had been delivered. The District Judge ruled that since it had not been shown that the law of Washington, D. C. differed from that of the State of Washington, the courts of the State would apply their own law. This is not disputed on appeal."
>
> *Continental Cas. Co. v. Thompson,* 369 F.2d 157, 158 n.1 (9CA 1966).

Thus in the absence of any applicable foreign law being pleaded in the lower court, the law of the forum, that is the law of Washington, is applicable in construing this insurance contract. This contention is supported by the fact that since this appeal is made from a summary judgment, there is nothing in the record sufficient to form a basis for the application of foreign law.

III—THE CONTRACT OF INSURANCE

A. Applicable Washington Rules of Construction:

The following are rules of contruction applicable to construing insurance policies in Washington:

1. *Exclusionary clauses in insurance contracts are strictly construed against the insurer.* This construction principle was most recently applied in *S. L. Rowland Construction Co. v. St. Paul Fire and Marine Ins. Co.,* 72 W.Dec. 2d 675, 434 P.2d 725 (1967). This case involved action on a fire insurance policy issued to a building contractor following a fire in a newly constructed residence. The fire was caused by the contractor's placing a joist too near the firebox of an upstairs fireplace. The policy contained an exclusion which stated that the policy did not apply to

> ". . . injury or destruction of:
>
> (4) any goods, products, or containers thereof manufactured, sold, handled or distributed by the Insured, or work completed by or for the Insured, *out of which the accident arises,* nor to costs of repair or replacement thereof." (Italics ours).
>
> *S. L. Rowland Construction Co. v. St. Paul Fire and Marine Insurance Co.,* 72 Wn. Dec. 2d, 675, 679.

It was not clear whether the exclusion pertained to all portions of the damaged structure or only to the particular part of the structure that was defective. In holding the latter, the court interpreted the ambiguity against the insurer with the following statement:

> "[1] Our determination of this question is governed by the established rule, as stated in *Labber-*

ton v. General Cas. Co., 53 Wn.2d 180, 182, 332 P.2d 250 (1958):

> '[T]he law in Washington is settled by a long line of cases recently reaffirmed by *Selective Logging Co. v. General Cas. Co.,* 49 Wn.(2d) 347, 301 P.(2d) 535, that exclusionary clauses are strictly construed against the insurer.' "
>
> *S. L. Rowland Construction Co. v. St. Paul Fire and Marine Insurance Co.,* 72 Wn. Dec. 2d 675, 681.

2. *The meaning most favorable to the insured must be applied where a part of the policy is susceptible to two different meanings.* This principle was recently recognized in *Safeco Ins. Co. of America v. McManemy,* 72 Wn.Dec. 2d 212, 432 P.2d 537 (1967). In this case the court was dealing with the uninsured motorist clause of an automobile policy. The Washington Supreme Court, contrary to the trial court, found an ambiguity in the contract and applied this principle of law to find in favor of the insured.

3. *The meaning and construction most favorable to the insured must be applied even though the insurer may have intended another meaning. Safeco Ins. Co. of America v. McManemy,* supra. *Town of Tieton v. General Ins. Co. of America,* 61 Wn.2d 716, 380 P.2d 127 (1963).

4. *In construing the contract, each part, if possible, should be construed so that all parts thereof shall have some effect. Safeco Ins. Co. of America v. McManemy,* supra; *Hollingsworth v. Robe Lbr. Co.,* 182 Wn. 74, 45 P.2d 614 (1935).

5. *Riders or endorsements do not modify or supersede provisions in the basic policy unless expressly*

so stated in the rider. The Washington court in *Holthe v. Iskowitz,* 31 Wn.2d 533, 197 P.2d 999 (1948) cited 44 C.J.S., Insurance, §300, page 1206 with approval:

> "*Rider or attached slip.* As a general rule, a lawful slip or rider which is properly attached to a policy and referred to therein is a part of the contract and should be constructed in connection with the other provisions of the policy, and the entire contract should be harmonized therewith if possible. Notwithstanding the attaching of a rider, provisions in the body of the policy are still parts of the contract and are not superseded, waived, limited, or modified by the provisions of the rider, except to the extent that it is expressly stated in the rider that the provisions thereof are substituted for those appearing in the body of the policy, or that the provisions of the rider have the effect of creating a new and different contract from that of the original policy; and except where the provisions in the policy proper and those in the rider are in conflict, in which case the latter control in construing the contract, especially where the provisions of the rider are the more specific.' "
>
> *Holthe v. Iskowitz,* 31 Wn.2d 533 541-542, 197 P.2d 999, 1004 (1948).

6. *The typewritten provision of a policy of insurance controls where inconsistent with printed portions. Holthe v. Iskowitz,* 31 Wn.2d 533, 197 P.2d 999, 1004 (1948). *Employers Mutual Liability Insurance Company of Wisconsin,* 358 F.2d 718, 719 (1966) and cases cited therein.

The following construction principles have not been specifically enumerated by the Washington Supreme Court but may fairly be inferred to be accepted by the Washington Court, basically because of their con-

sistency with the principles already enumerated:

1. *A later numbered endorsement controls one with an earlier number.* This principle is pointed out in 44 C.J.S. Insurance, §300, page 1208.

2. *"Having affirmatively expressed the coverage in a broad promise to defend and to indemnify, it was incumbent on the company to define the exclusions from that promise in clear terms." Insurance Co. of N.A. v. General Aviation Supply Co.,* 283 F.2d 590, 592 (CA 8, 1960). In this case, the Eighth Circuit Court of Appeals found coverage under an omnibus clause in an aircraft liability policy.

B. ANALYSIS OF THE POLICY

Fireman's Fund Policy No. LS-1214 provides for two basic coverages:

> "One (a) TO PAY PROMPTLY to any person entitled thereto, under the Workmen's Compensation law and in the manner therein provided, the entire amount of any sum due, and all installments thereof as they become due . . .
>
> One (b) TO INDEMNIFY this employer against loss by reason of the liability imposed upon him by law for damages on account of such injuries to such of said employees as are legally employed wherever such injuries may be sustained within the territorial limits of the United States of America . . ."

Both coverages by their terms are such as to require endorsements in order to make them complete. For that reason and for others, a total of ten endorsements are attached to the policy. With regard to coverage

one (a) printed endorsements 1 and 2 were attached so as to particularly describe the precise workmen's compensation law intended; that is, the Longshoremen and Harbor Workers' Compensation Act. In that manner, the requirements of one (a)(1) were satisfied.

Appellee to avoid coverage for appellant's loss occasioned by the Humpla injury must now find an interpretation of the policy so as to completely vitiate coverage afforded under section one (b). Appellee in the court below has argued that by endorsement 2 all coverage afforded by this policy has been eliminated save liability under the Longshoremen and Harbor Workers' Compensation Act. Appellee points to the second paragraph of endorsement 2 reading:

> "It is mutually understood and agreed that except as this policy may be otherwise extended by endorsement, no other liability of any nature whatsoever, except as defined by the said Longshoremen's and Harbor Workers' Compensation Act, is covered hereunder,"

as the basis for this contention. How patent is the fallacy of this argument is borne out by the fact that elsewhere in the contract of insurance by subsequent endorsement 6 entitled "Schedule of Operations" Fireman's Fund charges a premium rate for work performed of a nature not possible of being covered under the Longshoremen and Harbor Workers' Compensation Act. We specifically address attention to Code 6872 of the schedule of operations covering Oregon and Washington. Under that classification, work of a nature without the coverage provision of the Longshoremen and Harbor Workers' Compensation Act is provided for.

Section 903 of the Longshoremen and Harbor Workers' Compensation Act provides

> "(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. * * *".

As interpreted, many of the operations included in the schedule of operations enumerated in endorsement 6 are completely without the coverage of the Act in question. The only effect, therefore, in including those provisions in endorsement 6 is to bring those operations of appellant company within the coverage of section one (b). As an endorsement subsequent in number to endorsement 2, endorsement 6 has added force and effect.

That coverage afforded under section one (b) is fully effective notwithstanding endorsement 2 is borne out by typewritten endorsement 4 entitled "Limitation of Liability Endorsement Paragraph One (b)." Being a typewritten endorsement under rules of insurance contract construction it is entitled to greater effect than the printed endorsements prior to it in number. Endorsement 4 places a limit of $100,000 on Fireman's Fund liability with regard to its obligations under section one (b). Nowhere in this endorsement does Fireman's Fund in any respect limit, qualify or restrict the coverage, force and effect of one (b).

Not only do we feel that the preceding comments

have established the obligation of appellee but there are other areas of this contract of insurance written by Fireman's Fund which have created areas of doubt and confusion to which the particular rules of construction of insurance contracts are applicable.

Endorsement 2 begins in its first sentence with a specific limitation of coverage directly keyed to paragraph one (a). Appellee would then argue that the limitation proceeds from the specific to the general so as to, in its later paragraph, eliminate any other liability whatsoever under the policy. Our courts have held, however, that notwithstanding the attaching of an endorsement, provisions in the body of the policy are still part of the contract and are not superseded, waived limited or modified by the provisions of an endorsement except to the extent that it is expressly stated in the endorsement that the provisions thereof are substituted for those appearing in the body of the policy.

We submit that the construction of endorsement 2 as contended by appellee falls far short of this requirement of exactness.

Appellee argued in the court below that paragraph one (b) of the coverage was effective only in the event of the circumstance detailed in paragraph 3 of endorsement 2; that is, if the Longshoremen and Harbor Workers' Compensation Act were declared unconstitutional. It is the position of appellee that only in that event is there any coverage afforded under one (b). The particular limiting paragraph of endorsement 2, however, nowhere states that this is the only circumstances under which one (b) is to have force and effect. Again, appellee fails to show by

clear and cogent language that coverage under one (b) is so restricted.

The fourth paragraph of endorsement 2 makes the endorsement "subject to all the terms, conditions and agreements of policy LS-1214." Of course, one of the terms and conditions of this policy is coverage under one (b).

If endorsement 2 is read as appellee argues, this policy in question is nothing more than coverage under the Longshoremen and Harbor Workers' Compensation Act. Not only would section one (b) be eliminated but also all of the obligations of the contract whereby in paragraphs 2, 3 and 4 appellee undertook to serve the employer in certain regards as to inspection of work places, investigation of injuries, settlement of claims, to defend the employer and to pay costs taxed against the employer.

We submit that Fireman's Fund cannot by the language employed in endorsement 2 completely alter the entire insurance contract eliminating coverage for which it was charging and collecting a premium and destroying contractual obligations which it had incurred.

CONCLUSION

Pacific Inland Navigation Company, Inc., for valuable consideration, purchased a policy of insurance. It has performed all of its obligations and now asks that Fireman's Fund Insurance Company, in turn, perform its contractual obligation.

The injured party was an employee covered under

section five of the policy. The particular injury involved was an injury covered under section six of the policy. The injury occurred during the policy period as provided by section seven of the policy. The loss suffered by the employer was within policy limits and of a nature as covered by section one (b) of the policy.

Clearly, appellant is entitled to a reversal of the judgment below and direction of entry of a judgment in its favor according to the prayer of its complaint.

Respectfully submitted,

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